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OLL 85-0687/1
7 March 1985

MEMORANDUM FOR THE RECORD

SUBJECT: Second Hearing Before the Subcommittee on Legislation and National Security, House Committee on Government Operations, on the Constitutionality of the General Accounting Office's (GAO) Bid Protest Function.

1. The Subcommittee convened at 9:30 a.m. on 7 March 1985, in Room 2154 Rayburn, continuing its hearings on the above described subject. (MFR dated 28 February 1985.) The following Members were present:

Jack Brooks, Chairman (D., TX)
Frank Horton, Ranking Minority Member (R., NY)
David S. Monson (R., UT)
Joseph J. DioGuardi (R., NY)
H. James Saxton (R., NJ)

2. A copy of the Witness List is attached, along with copies of the prepared statements of the witnesses, except for the last named, who had none prepared.

3. Mr. David Stockman, Director, Office of Management and Budget, and Mr. D. Lowell Jensen, the Acting Deputy Attorney General of the Justice Department, gave support to the position taken by the Executive Branch, i.e., the Comptroller General, General Accounting Office, is an arm of the Legislative Branch and cannot bind the Executive Branch; and that the President has the right not to implement provisions of a law he deems unconstitutional. Although in Mr. Stockman's case, it was accepted that he was following up on the legal opinion received from Justice.

4. The General Counsel and Deputy General Counsel, Office of the Clerk, House of Representatives, (along with the last witness) disputed these contentions, saying the Judiciary has the responsibility and jurisdiction for resolving the issues, not the Executive Branch.

5. Both the Chairman and the Ranking Minority Member asked Mr. Jensen to submit supporting memoranda on:

(a) the authority for the Attorney General to declare provisions of any law unconstitutional before a court of law has rendered a decision; and

(b) why the Comptroller General may not bind the Executive Branch.

6. The Subcommittee adjourned the hearing at about 12:00 Noon.

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Liaison Division
Office of Legislative Liaison

Attachments

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Acting Chief, Liaison Division, OLL

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LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

Continuation of Hearings on the Constitutionality
of the GAO's Bid Protest Function

Thursday, March 7, 1985
9:30 a.m.
2154 Rayburn House Office Building

SCHEDULE OF WITNESSES

The Honorable David A. Stockman
Director
Office of Management and Budget

Steven R. Ross, Esquire
General Counsel
Office of the Clerk
House of Representatives

Accompanied by: Charles Tiefer, Esquire
Deputy General Counsel

The Honorable D. Lowell Jensen
Acting Deputy Attorney General
Department of Justice

Lawrence R. Velvel, Esquire
Attorney at Law

TESTIMONY

OF DAVID A. STOCKMAN

DIRECTOR OF THE OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE LEGISLATION AND NATIONAL SECURITY

SUBCOMMITTEE OF THE HOUSE COMMITTEE ON

GOVERNMENT OPERATIONS

MARCH 7, 1985

I appear today to discuss the role of the Office of Management and Budget in the implementation of certain provisions of the Competition in Contracting Act (enacted as part of the Deficit Reduction Act of 1984, Public Law 98-369 (DEFRA)) that the Department of Justice has concluded are unconstitutional.

I would like to emphasize that the focus of my testimony here is neither the merits of the Competition in Contracting Act (CICA) and its bid protest procedures nor the Comptroller General's role in the bid protest area. The Administration and this Office strongly support the principles of full and open competition implemented in the Act. In fact, CICA adopts the competitive procedures set forth in our proposal for a Uniform Federal Procurement System, which was submitted to Congress in February of 1982. We also believe the Comptroller General's advisory role in resolving bid protests is extremely valuable. Instead my testimony addresses only a narrow question regarding

implementing certain provisions of the Act that the Administration, as it has advised Congress, both in the President's signing statement on DEFRA and in the Department of Justice's views on H.R. 5184, believes to be unconstitutional.

As part of the Competition in Contracting Act, Congress passed two provisions which purported to permit the Comptroller General the authority to bind the Executive Branch. These are the so called stay provisions both pre- and post-award and the awarding of fees. Before the bill was passed, the Department of Justice advised Congress that it believed those provisions to be unconstitutional because they would permit an official of the Legislative Branch to exercise authority which, under the Constitution, can be exercised only by an official within the Executive Branch.

Despite the Department's objections, transmitted to Congress in April 1984, the provisions ultimately were adopted as part of the Act. Thus, in signing the Deficit Reduction Act, the President "vigorously" objected to these provisions and requested the Department of Justice to inform Executive branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 20 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

In response to the President's request, on October 17, 1984, the Department of Justice issued a memorandum which concluded

that the two provisions purporting to vest the Comptroller General with authority to bind the Executive Branch were unconstitutional and recommended that these provisions not be enforced by the Executive Branch. The Attorney General directed that this memorandum be distributed to Executive agencies to provide them with the guidance requested by the President. The Attorney General reiterated that position on November 21, 1984 in letters sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce these provisions. The Attorney General noted that his decision to advise agencies not to execute the unconstitutional provisions would best assure that these issues ultimately would be resolved by the courts.

The Attorney General also sent a letter to me, dated November 21, 1984, which requested my assistance in ensuring compliance by all Executive Branch agencies with the legal advice provided by the Department of Justice concerning the Act. Upon the advice of my General Counsel as to my responsibility to follow the Attorney General's opinion, on December 17, 1984, I issued a Bulletin to the heads of Executive departments and agencies setting forth procedures governing implementation of the Act and advising Executive agencies of their responsibility to conduct their contracting activities in conformance with the Attorney General's legal advice. The Bulletin also established reporting procedures to ensure that the Department of Justice was promptly informed of the filing of any litigation challenging its

opinion.

In conclusion, I wish to note that the Attorney General's legal advice is binding upon all Executive departments and agencies, which are required to conform their actions to his opinions. OMB, as part of its responsibility to ensure effective administration of Executive Branch activities, routinely issues bulletins to the heads of departments communicating information and instructions on how to respond to various problems that require coordinated responses by the agencies. For example, OMB acted similarly in advising all agencies to notify and coordinate with OMB on matters involving the separation of powers issues raised by the Supreme Court's decision in INS v. Chadha. In short, the actions of OMB in this matter have been ministerial, designed only to assure implementation and coordination of the legal conclusions of the Attorney General and the Department of Justice.

The Attorney General complied with the statute that establishes procedures for notification of Congress in circumstances in which he concludes that he cannot defend the constitutionality of a statute. Furthermore, as the Attorney General has stated, the procedures he followed are intended to provide for a quick judicial resolution of this controversy. I understand that one case involving the disputed sections is pending and there is, accordingly, every reason to believe that such proceedings will provide an appropriate end to this dispute.

Opening Statement of Congressman Jack Brooks
Continuation of Hearings on the Constitutionality of
the GAO's Bid Protest Function
Legislation and National Security Subcommittee
Thursday, March 7, 1985

THE SUBCOMMITTEE WILL COME TO ORDER. THESE HEARINGS WERE INITIALLY CALLED TO REVIEW THE CHARGES MADE BY THE EXECUTIVE BRANCH THAT KEY PROVISIONS OF THE COMPETITION IN CONTRACTING ACT ARE UNCONSTITUTIONAL.

HOWEVER, IT HAS BECOME INCREASINGLY CLEAR THAT THE ISSUES RAISED ABOUT THE COMPETITION ACT ARE GREATLY OVERSHADOWED BY A FAR MORE SIGNIFICANT ISSUE. THE ULTIMATE QUESTION WHICH THE SUBCOMMITTEE MUST ADDRESS IN THIS HEARING IS: CAN THE PRESIDENT OF THE UNITED STATES UNILATERALLY DECLARE A PORTION OF A PUBLIC LAW TO BE UNCONSTITUTIONAL AND THEN REFUSE TO ENFORCE IT? THE ANSWER TO THIS QUESTION HAS SERIOUS CONSEQUENCES FOR THE FUTURE OF OUR CONSTITUTIONAL FORM OF GOVERNMENT AND THE BALANCE OF POWER BETWEEN ITS THREE BRANCHES.

FOR THOSE OF YOU WHO THINK THAT THIS IS AN ESOTERIC SUBJECT, LET ME GET RIGHT TO THE POINT. UNLESS THE BALANCE OF POWER BETWEEN THE THREE BRANCHES OF GOVERNMENT REMAINS RELATIVELY EQUAL, WE ARE GOING TO END UP WITH A MONARCHY OR A DICTATORSHIP. IT IS AS SIMPLE AS THAT.

IN MY OPINION, THE ACTIONS OF THE PRESIDENT AND HIS AGENTS ARE UNPRECEDENTED IN THE HISTORY OF OUR GOVERNMENT. UPON SIGNING THE COMPETITION ACT INTO LAW, THE PRESIDENT DECLARED KEY PROVISIONS OF THE ACT TO BE UNCONSTITUTIONAL AND INSTRUCTED THE ATTORNEY GENERAL TO INFORM FEDERAL AGENCIES AS TO HOW TO IMPLEMENT IT. OMB DIRECTOR STOCKMAN, ARMED WITH THE ATTORNEY GENERAL'S OPINION, ORDERED FEDERAL OFFICIALS TO WILLFULLY VIOLATE THE LAW IN A DIRECTIVE HE ISSUED ON DECEMBER 17, 1984. HE DIRECTED, AMONG OTHER THINGS, THAT:

"AGENCIES SHALL TAKE NO ACTION, INCLUDING THE ISSUANCE OF REGULATIONS, BASED UPON THE INVALID PROVISIONS.

"WITH RESPECT TO THE 'STAY' PROVISION, AGENCIES SHALL PROCEED WITH THE PROCUREMENT PROCESS AS THOUGH NO SUCH PROVISION WERE CONTAINED IN THE ACT."

* * *

"WITH RESPECT TO THE DAMAGES PROVISION OF THE ACT, AGENCIES SHALL NOT COMPLY WITH DECLARATIONS OF AWARDS OF COSTS, INCLUDING ATTORNEYS' FEES OR BID PREPARATION COSTS, MADE BY THE COMPTROLLER GENERAL"

MR. STOCKMAN HAS BEEN ASKED TO APPEAR BEFORE THE SUBCOMMITTEE TODAY TO EXPLAIN HIS ACTIONS.

WE WILL NOW PROCEED WITH THE HEARING.

STATEMENT BY THE HONORABLE FRANK HORTON

MARCH 7, 1985

HEARING ON THE CONSTITUTIONALITY OF GAO'S BID PROTEST FUNCTION

THANK YOU, MR. CHAIRMAN.

I AM VERY PLEASED TO HAVE THESE DISTINGUISHED WITNESSES HERE TODAY TO HELP US DIRECT NECESSARY ATTENTION TO A VERY GREAT CONCERN OF MINE: NON-COMPLIANCE WITH THE BID PROTEST PROVISIONS OF THE COMPETITION IN CONTRACTING ACT.

THE NEED FOR THESE HEARINGS ARISES FROM THE ACTIONS OF OMB AND THE JUSTICE DEPARTMENT, FROM WHOM WE WILL HEAR TODAY. I UNDERSTAND THE VIEWPOINT THAT JUSTICE HAS EXPRESSED WITH REGARD TO THE SEPARATION OF POWERS IN CONNECTION WITH THE COMPETITION IN CONTRACTING ACT. OBVIOUSLY, I DISAGREE WITH THAT VIEW; AND THE OVERWHELMING PREPONDERANCE OF TESTIMONY PRESENTED TO US LAST WEEK CERTAINLY REINFORCED MY CONVICTION. NEVERTHELESS, I AM NOT THE FINAL ARBITER OF THAT. BUT NEITHER IS OMB, THE JUSTICE DEPARTMENT, OR, FOR THAT MATTER, THE PRESIDENT OF THE UNITED STATES. THAT IS THE JOB OF THE COURTS.

SO THE ISSUE THAT CONFRONTS US TODAY IS INDEED THE SEPARATION OF POWERS, BUT--AS I SEE IT--A MATTER OF <u>EXECUTIVE</u> BRANCH INFRINGEMENT. FULL IMPLEMENTATION OF THE COMPETITION IN CONTRACTING ACT, OF COURSE, IS OUR IMMEDIATE OBJECTIVE. BUT THE UNILATERAL DECLARATION BY THE EXECUTIVE BRANCH THAT PROVISIONS OF THE ACT ARE UNCONSTITUTIONAL --DESPITE THE PRESIDENT'S SIGNATURE-- IS BLOCKING IMPLEMENTATION. I FIND NO AUTHORITY FOR THE DIRECTOR OF OMB TO DIRECT FEDERAL AGENCIES TO DISOBEY THE LAW, OR FOR THE ATTORNEY GENERAL TO ADVISE THAT. ACCORDINGLY, I HOPE OUR DISTINGUISHED WITNESSES WILL RECONSIDER THIS MATTER AND JOIN US IN ASSURING FULL AND OPEN COMPETITION IN GOVERNMENT PROCUREMENT.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 17, 1984

BULLETIN NO. 85-8

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

SUBJECT: Procedures Governing Implementation of Certain Unconstitutional Provisions of the Competition in Contracting Act of 1984

1. Summary. The Department of Justice has concluded that two provisions of the Competition in Contracting Act of 1984 are unconstitutional because they purport to authorize the Comptroller General to exercise Executive authority in violation of the principle of Separation of Powers. Pending judicial resolution of the matter, agencies which exercise procurement authority will hereafter be required to conduct their contracting authority in conformance with the Department's legal advice.

2. Background. On July 18, 1984, the President signed the Competition in Contracting Act, enacted as part of the Deficit Reduction Act of 1984, Public Law No. 98-369, 98 Stat. 494. At the time he signed the bill, the President issued a statement questioning the constitutionality of several provisions of the Act which ostensibly authorized the Comptroller General to bind Executive Branch agencies concerning certain aspects of the bid protest process. The President further requested that the Attorney General advise Executive agencies how to comply with the Act in a manner consistent with the Constitution.

On October 17, 1984, the Department responded to the President's request by issuing an opinion which concluded that several provisions added by Section 2741 of the Act were unconstitutional:

- 31 U.S.C. 3553(c) and (d), which require a procuring agency to suspend or "stay" a procurement if a bid protest is timely filed and purport to authorize the Comptroller General to lift this "stay" of the procurement by issuing his decision on the bid protest.

- 31 U.S.C. 3554(c), which purports to authorize the Comptroller General to make binding awards of attorneys' fees and bid preparation costs to successful bid protestors.

e Department concluded that the Comptroller General, as a egislative Branch official, could not exercise these Executive anch authorities consistent with the Constitution, as recently nterpreted by the Supreme Court in INS v. Chadha, 462 U.S. 919 1983). The Department therefore concluded that these three ections must be stricken from the Act. (A copy of the epartment's letters to the Speaker of the House and the Vice resident, as well as its formal opinion on the subject, are ttached to this Bulletin.)

he Department did not question the validity of the remainder of he Act, including specifically its grant of authority to the omptroller General to review bid protests. The Department oncluded that the Comptroller General could properly continue to eview and issue opinions with respect to bid protests, but that hese decisions must be regarded as advisory only and not binding on the Executive Branch.

3. Action Requirements. The following principles are to be observed by Executive agencies with respect to the unconstitutional provisions of the Act:

- Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions.

- With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act. Pursuant to the provisions of the Federal Acquisition Regulations, the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based upon other valid authority and may not be based upon the invalid stay provisions of the Act.

- Agencies shall comply with the provisions of 31 U.S.C. 3553(b) concerning the submission of reports to the Comptroller General on protested procurements.

- With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.

- Agencies shall comply with 31 U.S.C. 3554(e) concerning submission of reports to the Comptroller General on unaccommodated recommendations.

4. Report Requirements.

- Each agency should report to its OMB budget examiner and the Office of Legal Counsel any declarations of awards issued by the Comptroller General.

- If the agency is sued by any bid protestor or other person who challenges its failure to comply with the unconstitutional provisions of the Act, the agency shall immediately notify the Department of Justice.

5. General Provision. Questions concerning these implementation procedures should be directed to the Office of Federal Procurement Policy through your OMB budget examiner. Any questions concerning the interpretation of the unconstitutional provisions should be directed to the Office of Legal Counsel of the Department of Justice.

6. Sunset Date. This bulletin will remain in effect until superseded or rescinded.

David A. Stockman
Director

Benjamin J. Guthrie
Clerk

W. Raymond Colley
Deputy Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

STATEMENT ON BEHALF OF THE OFFICE
OF GENERAL COUNSEL TO THE CLERK
OF THE HOUSE OF REPRESENTATIVES
REGARDING
THE EXECUTIVE BRANCH'S DECLARATION
THAT THE COMPETITION IN CONTRACTING ACT
IS UNCONSTITUTIONAL

Mr. Chairman and Members of the Committee, we -- Steven R. Ross, General Counsel to the Clerk of the House of Representatives, and Charles Tiefer, Deputy General Counsel -- are here today on invitation of the Committee to discuss an unprecedented and dangerous step by the Executive Branch in response to the Competition in Contracting Act ("CICA"). The Office of Management and Budget, in issuing its directive of December 17, 1984, has commanded all federal contracting officers, handling well over $ 150 billion a year in contracts, not to obey a duly enacted Act of Congress designed to encourage competition in procurement.

OMB's action flatly violates the express instruction of the Constitution that the President shall "take care that the Laws be faithfully executed," U.S. Const., art. II, § 3. It represents an assumption by OMB and by the Department of Justice, which advised OMB to take this action, of prerogatives that properly belong where they have reposed for two centuries -- solely in the hands of an independent Judiciary. In essence, it constitutes

the assertion of a new power of Executive supremacy, which this Committee need not, and should not, accept.

On Monday, March 4, 1985, the Department of Justice followed up that OMB directive by attacking the constitutionality of the CICA in its brief filed in a lawsuit brought by a government contractor in federal court in California.1/ Yesterday, on Wednesday, March 6, 1985, the Speaker and Bipartisan Leadership Group of the House of Representatives, who we represent in litigation, intervened in that lawsuit to provide an official defense of the act's constitutionality.2/

We believe that under the applicable Supreme Court precedents the challenged Act of Congress is clearly constitutional. We have addressed that in the fifty-page brief, with exhibits, which we filed yesterday in that case. We will present our views to the Court in a hearing in federal court in Los Angeles on Monday, March 11, 1985.

However, the real issue before this Committee today is not the constitutionality of CICA.3/ If the Department of Justice

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1/ Lear Siegler Inc., Energy Products Division v. John Lehman, Secretary of the Navy, et al., No. 85-1125 (C.D. Cal.).

2/ The Bipartisan Leadership Group consists of the Majority Leader and Majority Whip, the Minority Leader and Minority Whip, and for this lawsuit, Chairman Brooks and Ranking Minority Member Horton.

(footnote continued)

had simply awaited the filing of a proper case, presented its views in court regarding that Act, and awaited the ruling of the court, we would probably not be here testifying. The real issue is that the ~~Department of Justice~~ Executive has gone beyond merely presenting its views in court. It has now taken on unprecedented and unconstitutional powers of Executive supremacy, in presuming to decide the issue in advance of litigation -- and to instruct all executive officials not to obey the law. The real issue for this Committee is the power assumed by OMB in issuing its nationwide directive of December 17, 1984, instructing the contracting officers of the federal government not to obey a duly enacted Act of Congress.

The Events Which Led to this Assertion of Novel Power

On May 9, 1984, the House Committee on Government Operations

3/ As appendices to this testimony, we are attaching a copy of our brief. Since in many respects the Justice Department's attack on the constitutionality of CICA represents an attack on the whole concept of having an independent General Accounting Office as a check on waste and fraud in the government, we are also attaching a copy of a survey of the practices of the fifty states by the American Law Division of the Library of Congress. That survey shows that "every state has made some provision for an auditor or controller," whose duties are typically akin to the work of the federal General Accounting Office.

reported the Competition in Contract Act of 1985, H.R. 5184, 98th Cong., 2d Sess. In past years, procuring agencies had failed miserably to procure the efficient and money-saving way, through competition. In 1983, for example, a mere one-third of the total procurement had been done competitively -- $ 54 billion of competitive procurement out of $ 168 billion of total procurement. The rest of procurement was done noncompetitively, such as by sole-source purchases, often at inflated prices.4/

CICA imposed a series of requirements on federal procuring agencies to increase the amount of procurement done competitively, such as requirements that they await GAO scrutiny before making disputed contract awards. The statute was obviously constitutional, as it just provided as a standard matter the kind of stay needed to avoid agency evasion of GAO

4/ The ultimate goal was to prevent such situations as the spare parts scandals of last year, in which this Committee found that the Air Force was at one time considering buying an allen wrench from a largedefense contractor for about $ 9,000, although its original cost from the actual manufacturer was eight cents.

One of this act's four main approaches was to strengthen the General Accounting Office's bid protest system, as an independent and expert tribunal for resolving protests by potential government contractors who had been excluded from lawful competition. A much-complained about method for procurement officers to avoid GAO scrutiny had been for them to award the contract while GAO was deciding the protest, thereby presenting the GAO with a fait accompli about which there was little to be done. The Act sought to cure that by a stay provision that prevents procurement officers from awarding contracts while the protest is pending before GAO. Similar stays had been ordered often by the courts precisely to prevent such fait accomplis; the act provided for such stays on a regular basis.

decisions which the courts had granted routinely for fourteen years.

Nevertheless, President Reagan, in signing the Deficit Reduction Act on July 18, declared certain provisions dealing with GAO's strengthened role to be unconstitutional. The Department of Justice dutifully wrote opinions declaring that the act was unconstitutional. Although the act had been passed with overwhelming bipartisan support, and although counsel for the Clerk of the House, the Senate, and General Accounting Office prepared careful opinions explaining the constitutionality of the statute, the Department of Justice refused even to admit that there were arguments in support of the statute.

Instead, Attorney General William French Smith wrote the Speaker of the House on November 21, 1984 that, in effect, there were no reasonable arguments to be made in defense of the statute. Attorney General Smith also pronounced that no private contractor whose contract had been withheld under the law could challenge it. Accordingly, he indicated that all federal contracting officials would be directed to disobey the statute. He said that such wholesale disobedience to the law "will best assure a rapid and definitive judicial resolution of these constitutional issues."

On December 17, 1984 the Office and Management and Budget implemented this pronouncement, with a directive to the heads of

all executive departments and agencies. It imposed the "Action Requirements" that "Agencies shall take no action ... based on the [challenged] provisions."

The Constitution Does not Allow Executive Officials to take on the Judicial Prerogative of Striking Down Acts of Congress

Under Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." This means that, in an appropriate case, the Judiciary can overcome the presumption of constitutionality applicable to an Act of Congress and decide that it is unconstitutional.

However, Marbury v. Madison did not say that it was "the province and duty of the Executive department to say what the law is." It has been one of the bedrock principles of our system that only the Judicial department has that power. No federal official -- not the President, nor any subordinate -- has it.

Yet now, the Justice Department has begun to claim that power. The Justice Department has begun arguing that "in the case of a conflict between the Constitution and a statute"--

meaning, when the Justice Department decides there is a conflict" -- that "the President's duty faithfully to execute the laws requires him not to observe a statute...." In other words, now, when the President does not want to observe an inconvenient statute, all he need do is get a supportive opinion from his Attorney General, and so long as he can get such an opinion, he need not "observe [the] statute."

This novel proposition equates the powers of mere executive officials, with those of the Judiciary. It would make hash of the fundamental Rule of Law that binds executive officials to obey duly enacted statutes until the Judiciary says otherwise. As the Supreme Court has explained:

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it.

United States v. Lee, 100 U.S. 196, 220 (1882).

The rule that no executive official can decide for himself what laws he is bound to obey, but must await decisions of the Judiciary and until then must obey the laws, has deep roots in our constitutional history. During the reign of absolute British monarchs, the notion that the Executive -- i.e., the King -- could decide for himself, without a decision of the courts, which laws should be

obeyed, was put to the test. After the Restoration, King James II attempted to claim such authority, but the English people would no longer tolerate such a claim, and their judicial system rejected it in the historic Seven Bishops Case of 1688.5/

Shortly thereafter, James II was forced into exile in the Glorious Revolution of 1689, and the English Bill of Rights was enacted. The first article of that historic charter of freedom declared "That the pretended power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal."6/ Scholars have concluded that the "faithful execution" clause of our Constitution is a mirror of the English Bill of Rights' "abolition of the suspending power"7/, that is, the abolition of what the English Bill of Rights had called "the pretended [Royal] power of Suspending ... the Execution of Laws."

5/12 How. St. Tr. 183, 377 (1688). In that case, English bishops who rejected King James II's claim of authority were tried for seditious libel. Two Judges of the King's Bench rejected the King's claim, and the jury so found, acquitting the defendants.

6/W. & M., Sess. 2, c. 2 (1689).

7/ Reinstein, An Early View of Executive Powers and Privileges: Trial of Smith and Ogden, 2 Hastings Con L. Quart. 309, 321 (1975); see Stewart, The Trial of the Seven Bishops, Cal. St. Bar. J. Feb. 1980, at 70 (account of case).

In fact, the Constitutional Convention in 1787 expressly rejected the attempt to re-introduce some power for the President to decide to suspend the execution of laws.[8/] Instead, the Framers imposed on the President the duty "to take care that the Laws be faithfully executed."

There is not a shred of support in the records of the Constitutional Convention, or the history we have described, to support the Justice Department's argument, that the "faithful execution" clause was intended to allow the President the have the power of the Judiciary -- to decide for himself whether he considered laws unconstitutional, and if he felt so, to refuse to obey them. That view of Executive supremacy over the laws runs contrary both to the historic derivation of the "faithful execution" clause, and to the Constitutional Convention's stated decisions.

If the Framers had intended to give the President any such awesome power of deciding the constitutionality of laws as they gave to the Judiciary, there surely would be a clear record of it. Yet Alexander Hamilton, who discussed in

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8/ A proposal was made in the constitutional convention "that the national executive have a power to suspend any legislative act ....." The Convention rejected the proposal, after Elbridge Gerry observed "that the power of suspending might do all the mischief dreaded from the nevative of useful laws [i.e., the President's veto], without answering the salutary purpose of checking unjust or unwise ones." IV J. Elliott, Debates in the Federal Convention (2d ed. 1836).

detail the authority of the Judiciary to decide the constitutionality of laws, provided no such discussion of the supposedly equivalent Presidential power.

Any possible doubt about the matter, if there could be any, was resolved in the historic case of Kendall v. United States, 37 U.S. 912 Pet.) 524 (1838). There, a Cabinet Member claimed that because he was subject to the President, who, in turn, supposedly derived a vast power from the "faithful execution" clause, he was not bound by the laws.

The Supreme Court utterly rejected any such argument of Executive supremacy. The Supreme Court said that "to contend, that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible."9/ That Court harkened directly back to the classic language of the English Bill of Rights, and the Framers in the Constitutional Convention, in rejecting Executive power to "forbid [the] execution" of the laws.

In rejecting the Executive's argument, the Court explained that the effect of such power would be the

> vesting in the President [of] a dispensing power, which has no countenance for its support, in any

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9/38 U.S. at 613.

> part of the constitution; [such an argument is] asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of Congress, and paralyze the administration of justice.

38 U.S. at 613 (emphasis supplied).10/

OMB's Directive Is a Nationwide, Government-Wide Instruction Not to Obey the Law -- not a "Test Case"

In most situations, the proper course for the President, or an executive official, to obtain from the Judiciary a decision on the constitutionality of a law, is to await the action of an aggrieved individual to file a proper lawsuit against the government or otherwise, and for the Department of Justice to defend the Act of Congress. Then, if the

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10/A similar early ruling in United States v. Smith and Ogden, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806), proclaimed:

> The President of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of trhe lawsdependent on his will and pleasure; which is a doctrine that ... will not meet with any supporters in our government.

The court summed up:

> In this particular, the law is paramount. Who has dominion over it? None but the legislature....

Id.

Judiciary decides against the defense made of the Act, and strikes the Act down, the presumption of constitutionality has ended, and the official is no longer bound by the law.

On rare occasions, where the President believes that the Act of Congress invades his constitutional powers, the Department of Justice has wished not to defend the Act in the views it expresses to the courts, but to attack the Act. We have grave doubts about the way the Justice Department's pursuit of such a course.11/ Yet even on those rare occasions, the context has usually not been one of disobedience to the Act of Congress. Rather, the sound course has been for the President or executive official to obey the law, and to present his views to the Judiciary. Then, if -- and only if -- the Judiciary pierces the presumption of constitutionality which binds the executive official, and declares the law unconstitutional, is the President then freed from the binding nature of the law.

11/We have considerable doubt as to the wisdom and propriety of such presentations of views. Among other reasons, it is too easy for the Executive, as discussed below, to seek to aggrandize its powers; to give too little heed to presumption of constitutionality; to give vent to political will rather than concern for the Constitution; and to place a burden on the Congress to intervene in court cases and litigate, when that burden more appropriately should be shouldered by the Department of Justice. However, that is a matter to be discussed at another time. The subject of this hearing is not a mere presentation of views to the court by the Executive, but an order from OMB not to obey the law.

For example, in Immigration and Naturalization Service v. Chadha, 103 S. Ct. 2764 (1983), the Executive Branch took the view that the legislative veto in the Immigration and Nationality Act was unconstitutional. However, that did not lead the Justice Department, which has responsibility for that law, to refuse to obey it. On the contrary, the Justice Department, through its Board of Immigration Appeals, "held that it had 'no power to declare unconstitutional an act of Congress,'" id. at 2772.

The Department of Justice obeyed the legislative veto of Mr. Chadha's request for citizenship. Understanding its duty, it carried out the law even while presenting its views to the Judiciary that the law was unconstitutional. The courts had no difficulty resolving the case on this basis. They ultimately ruled that the legislative veto was unconstitutional. Only after the courts had so ruled, was the Justice Department released from the binding presumption of constitionality -- and only then did it cease obeying the statute.

Most of the examples mentioned by the Justice Department to justify its action fall into this pattern.12/ It mentions

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12/ United States v. Lovett, 328 U.S. 303 (1946)(executive obeys funding cut-off and refuses to pay employee Lovett; Justice Department meanwhile presents its view to the courts that the funding cut-off was unconstitutional; court agrees and releases
(footnote continued)

three disputes in the 1950s and 1960s over provisions for "committee vetos," similar to legislative vetoes. Yet in two, Presidents Kennedy and Johnson found ways to express their views, without taking up the doctrine of Executive showing their displeasure -- a method similar to the expression of views to the Judiciary in Chadha. They testified against the laws at Congressional hearings. They declined to exercise some discretionary authority to avoid a clash. But they did not put forth the menacing doctrine stated here by the Justice Department -- that it can decide, like the Judiciary, what laws are unconstitutional, and thus which laws the President need not obey.13/

The Justice Department cites an aberrational view taken during President Eisenhower's years -- a temporary assertion that certain provisions could "be regarded as invalid by the

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executive from cut-off); Buckley v. Valeo, 424 U.S. 1 (1976)(Federal Election Commission carries out its statute; Justice Department meanwhile presents its view to the courts that certain provisions of the statute were unconstitution; court agreed and struck those down, while retroactively validating pre-decision acts of the Commission).

13/ Public Papers of the Presidents: John F. Kennedy 6 (1963)(construing a provision narrowly as a Congressional "request for information"); Public Papers of the Presidents: Lyndon B. Johnson, 104, 1250 (1963-64)(opposition to committee vetos). The full story of such disputes was discussed in hearings under the notable chairmanship of Senator Sam Ervin, subsequently chairman of the Watergate Committee. See Separation of Powers: Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess. (1967).

Executive Branch."14/ This example proves peculiarly well the reasons against any such assertion of power for the the full story is quite another matter. For one thing, President Eisenhower swiftly compromised with the Congress on this issue, avoiding an outright clash.15/

But more important, their example shows where such assertions of Executive supremacy lead. For having tasted the fruit of such unbridled power, the White House resorted to it again, in 1960, as a means of covering up scandal in a

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14/ Public Papers of the Presidents: Dwight D. Eisenhower, 689 (1955).

15/ As the committee veto dispute continued, Congress passed a bill with another such provision. The bill said that contracts for family housing at military installations would not be entered into until the Defense Department "has come into agreement with the Armed Services Committees." (Section 219 of H.R. 9893, 84th Cong., 2d Sess. (1956)).

President Eisenhower vetoed the bill, but indicated that an alternative procedure would be acceptable. (Message from the President of the United States Returning Without Approval the Bill (H.R. 9893) ..., H.R. Doc. No. 450, 84th Cong., 2d Sess. 2 (1956).

Congress then reenacted the bill, with a provision saying that such contracts would not be entered until the Defense Department "has submitted to the Armed Services Committees ... a written reort ...; and a one hundred and eighty-day period has elapsed ... or the committees have advised the Secretary of Defense , in writing, that there are no further questions." Section 419 of H.R. 12270, 84th Cong., 2d Sess. (1956), as enacted, Pub. L. No. 84-968, 70 Stat. 991, 1018-19.

Then, President Eisenhower conceded and signed this bill without objection, and the controversy ended.

If this is the Justice Department's precedent for an OMB directive for nationwide disobedience to the Competition in Contracting Act, it is resorting to far-fetched analogies indeed.

Latin American loan program. Congress had insisted on the release of documents being covered up, by providing by statute that if the key documents were not released, funds for the program would be cut off. The White House refused to release the documents, and refused to obey the law, claiming it was not bound to.16/ It obtained an opinion of the Attorney General to back it up.

As Clark Mollenhoff, the respected investigative reporter who looked into the matter, described, Congressional hearings were then held which "revealed malodourous details of incompetence, conflicts of interest laxity, and illegal diversion of funds."17/ The White House was so embarrassed at this that the new President -- President Kennedy -- abandoned the previous position and released the documents.18/

That eliminates the claim that Presidents can issue general instructions not to obey the law. What it leaves are the truly rare situations that arise perhaps once in a score of years, if not even less often than that, when there is a

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16/ Public Papers of the President Dwight D. Eisenhower 881 (1960).

17/R. Berger, Executive Privilege16: A Constitutional Myth 240 (1974), citing Clark Mollenhoff, Washington Cover-Up 184, 187-89 (1962).

18/ Id.

challenged Act of Congress but no prospect whatsoever for a ruling by the Judiciary on it unless the President breaks the law. In these rarest of situations, the law has been broken to create individual, narrowly focused test cases of the law.

For example, twice Presidents have tried to fire quasi-judicial officers despite statutes protecting their independence. The only way to have a test case of such a statute is to fire such an official. In the 1930s, one such case occurred, and in the 1950s, another such case occurred. The Supreme Court upheld both laws and rejected both firings.19/

Obviously, a situation where the President must break a statute, in order to test it, is a highly regrettable spectacle and dangerous for the Rule of Law. Fortunately, it is virtually never necessary, and it has some clearly visible delineations. The particular law must be one which everyone agrees cannot be tested any other way. The particular test example must be one specific, isolated incident, the results

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19/ Humphrey's Executor v. United States, 295 U.S. 602 (1935); Wiener v. United States, 357 U.S. 349 (1958). Also, Presidents have sought to test laws protecting the tenure of the Secretary of War -- the dispute which led to the impeachment trial of Andrew Johnson -- and a patronage employee, a local postmaster -- the dispute which led to Myers v. United States, 272 U.S. 52 (1926). The Justice Department has come up with no more examples of test cases than this, in looking over two hundred years of the resolution of constitutional issues.

of which can be dealt with in a single case. The public should at all times be protected from the alien and frightening prospect of the Executive branch declaring itself not to be bound by the law, by executive officials continue to obey the laws during the test case.

There is no comparison between such narrowly defined test cases, and the situation here. Here the Office of Management and Budget has used its awesome powers to issue a sweeping, nationwide instruction to all contracting officers not to obey the law. The instruction will affect, simultaneously, many billions of dollars of procurements. The number of contractors affected will number in the hundreds, if not thousands.

Moreover, there is absolutely no basis for the contention that this is the only way to test the statute. In fact, this statute could easily have been tested in the normal way. The statute stops for a time the award of a contract to a particular contractor, while the GAO decides a bid protest. Obviously, that contractor can go to court and, in a proper case, test the statute. The Justice Department never even waited to see if a contractor would do so. Yet in the very first confrontation -- the one in federal court in California -- the contractor aggrieved by the statute has gone to court. Rather than asserting the incredible doctrine

of Executive supremacy, the Justice Department could have gotten the court case it desires just by obeying the statute and letting such a contractor sue.

The fact of the matter is that the Justice Department's claim -- that this OMB directive was the only way to test the statute -- is a mere fig leaf covering the assertion of the doctrine of Executive supremacy. Having now made the grandiose assertion that when the President does not want to obey a statute, he does not have to, the Justice Department can be expected to attempt to enlarge the precedent whenever it does not like a statute.

Where will the Claimed Executive Power Lead?

The consequences of this doctrine must not be underestimated. It is one thing to have the fate of statutes decided by the Judiciary -- by an independent group of jurists, not personally interested in any case nor tied to the parties, confined by procedure and precedent, and subject to the traditions established by two centuries. Moreover, in judicial cases, before there is any decision, those supporting the Act of Congress will, hopefully, have the opportunity to present all possible arguments in its favor, and have them weighed neutrally and with the option of

appeal.

It is quite another thing for the fate of statutes to rest in the hands of the Attorney General. He is generally a political associate of the President, placed in that position because he is expected to be supportive, and capable of being removed at any time if he is not. He shares the ideological bent of the particular Administration rather than the long-term precedents which control the courts. Moreover, he need not hear from the affected individuals, the supporters of the law in Congress, scholars, or anyone else other than the internal bureaus of the Department of Justice, with their own agendas, before making a decision.

For these reasons, the Rule of Law indicates that this Committee should reject the doctrine of Executive supremacy, and should refuse to recognize as legitimate the OMB directive instructing the procuring officers of the government not to obey the law.

Department of Justice

STATEMENT

OF

D. LOWELL JENSEN
ACTING DEPUTY ATTORNEY GENERAL

BEFORE

THE

SUBCOMMITTEE ON LEGISLATION
AND NATIONAL SECURITY
GOVERNMENT OPERATIONS COMMITTEE
HOUSE OF REPRESENTATIVES

CONCERNING

COMPETITION IN CONTRACTING
ACT OF 1984

ON

MARCH 7, 1985

TESTIMONY OF D. LOWELL JENSEN
ACTING DEPUTY ATTORNEY GENERAL
BEFORE THE LEGISLATION AND NATIONAL SECURITY
SUBCOMMITTEE OF THE HOUSE COMMITTEE ON
GOVERNMENT OPERATIONS

March 7, 1985

I am happy to appear before you today to discuss the Department's position with respect to the Competition and Contracting Act of 1984 ("CICA" or "the Act"), which was enacted as part of the Deficit Reduction Act of 1984. Public Law No. 98-369, 98 Stat. 494 (1984). When the President signed this legislation into law, he requested the Attorney General to inform the Executive Branch agencies regarding how to comply with the Act in a manner consistent with the Constitution. As you know, in response to this request, the Department has determined that federal agencies should not execute certain bid-protest provisions of the Act. The first provision requires a procuring agency to suspend or "stay" any procurement if a bid protest is filed prior to the award of a contract or within ten days after the award. The provision then purports to authorize the Comptroller General to lift this stay of the procurement by issuing his decision on the bid protest. See revised 31 U.S.C. § 3553(c) and (d). The second provision purports to authorize the Comptroller General to make binding awards of attorney's fees and bid preparation costs to successful bid protestors. See revised 31 U.S.C. § 3554(c).

Before I discuss these specific provisions, however, there are several points that I would like to make with respect to the Department's position on the CICA. First, I want to emphasize that the Department has no general objection to the bid protest procedures established by the CICA. To the contrary, we believe that the Comptroller General plays a very useful advisory role in the bid protest area, and we believe that his participation has been extremely helpful in resolving bid protest disputes. Thus, we are happy to see the Comptroller General continue his review of bid protests, and we have no objection to the explicit statutory authorization for this role that is set forth in the CICA.

Second, we are entirely sympathetic with the need, in some instances, to suspend or delay a procurement in order to resolve the legal questions raised by a bid protest. Because the Executive Branch is sensitive to the need for a stay in some circumstances, the Federal Acquisition Regulations (FAR) provided prior to the CICA, and the revised FAR provisions on bid protests continue to provide, for the suspension of a procurement if a bid protest is filed prior to the award of a contract. See 48 C.F.R. § 33.104(b), 50 Fed. Reg. 2271 (January 15, 1985). Thus, although we do not believe that the Comptroller General may play a role in determining when a stay may be lifted, the Executive Branch has provided on its own a stay provision that substantially meets the concerns that motivated the stay provision in the CICA.

In explaining the Department's decision, I would like to discuss three general subjects. First, I would like to set forth the history of the Department's policy with respect to this issue in order to place the decision in its proper context. Next, I would like briefly to describe the grounds for our legal conclusion with respect to the constitutionality of the CICA. Finally, I would like to discuss the reasons underlying the Department's decision not to enforce the unconstitutional provisions of the Act.

I

Since the adoption of the Budget and Accounting Act in 1921, the Department has taken a consistent position with respect to the power and authority of the Comptroller General. Because the Comptroller General is part of the Legislative Branch of the Government, the position of the Department has been that the Comptroller General may not bind the Executive Branch. See, e.g., Testimony of Larry Hammond, Deputy Assistant Attorney General, Office of Legal Counsel, before the Subcommittee on Legislation and National Security of the House Committee on Government Operations, 95th Cong., 2d Sess. (June 28, 1978). Although differences of opinion with respect to the proper role of the Comptroller General have led to a number of disputes between the Department and GAO, these disputes have not come to a head because the Comptroller General has not pressed his authority to bind the Executive Branch.

Early in 1984, the Department received a request from this Committee for comments on bid protest provisions, similar to the ones finally adopted in the CICA, that were then under consideration by the Committee as part of H.R. 5184. The Department commented on and objected to the constitutionality of the two provisions that purported to give the Comptroller General the authority to bind the Executive Branch. See Letter to Honorable Jack Brooks, Chairman, House Committee on Government Operations, from Robert A. McConnell, Assistant Attorney General, Office of Legislative and Intergovernmental Affairs (April 20, 1984). I would be happy to provide the Committee with a copy of this letter and any other documents referred to in my testimony. These comments were based on the Department's long-standing position with respect to the proper constitutional role of the Comptroller General and the authority of the Legislative Branch as most recently defined in INS v. Chadha, 462 U.S. 919 (1983).

Despite the comments of the Department with respect to the unconstitutionality of these provisions, the provisions were ultimately adopted by Congress as part of the CICA, which itself was made a part of the Deficit Reduction Act. Although the President believed the two provisions of the CICA that empowered the Comptroller General to bind the Executive Branch to be unconstitutional, he concluded that it would not be in the national interest to veto the entire Deficit Reduction Act because of

these provisions. Therefore, the President noted in a signing statement his constitutional objections to these provisions and requested the Department of Justice to inform Executive Branch agencies how they might comply with the Act in a manner consistent with the Constitution. See 30 Weekly Comp. Pres. Doc. 1037 (July 18, 1984).

Thereafter, the Office of Legal Counsel prepared a memorandum, which concluded that the two provisions purporting to vest the Comptroller General with authority to bind the Executive Branch were unconstitutional and recommended that these provisions not be enforced by the Executive Branch. See Memorandum for the Attorney General, from Larry L. Simms, Acting Assistant Attorney General, Office of Legal Counsel, re "Implementation of the Bid Protest Provisions of the Competition and Contracting Act" (October 17, 1984). The Attorney General directed that this memorandum be distributed to the Executive Branch agencies responsible for implementing the provisions of the CICA.

Subsequently, the Attorney General expressly adopted the conclusions of the Office of Legal Counsel in letters sent to the Speaker of the House and the President of the Senate to inform Congress, as required by statute, of the Department's decision not to enforce the two unconstitutional provisions of the CICA. See Letters to Honorable Thomas P. O'Neil, Jr., Speaker

of the House of Representatives, and Honorable George Bush, President of the Senate, from William French Smith, Attorney General (November 21, 1984). In addition, the Attorney General responded by a letter of the same date to a letter from Senator William S. Cohen, Chairman of the Subcommittee on Oversight of Government Management of the Senate Committee on Governmental Affairs. In the letter to Senator Cohen, the Attorney General reiterated the basis for the Department's conclusions with respect to the unconstitutionality of the CICA and, in particular, set forth the basis for the Department's decision to advise Executive Branch agencies not to comply with the unconstitutional provisions.

The Attorney General also sent a letter to the Director of the Office of Management and Budget (OMB), dated November 21, 1984, which requested the Director to assist in ensuring compliance by all Executive Branch agencies with the legal advice provided by the Department of Justice concerning the CICA. Subsequently, the Director of OMB issued a bulletin to the heads of executive departments and agencies setting forth procedures governing implementation of the CICA, which advised executive agencies to conduct their contracting activities in accordance with the Attorney General's legal advice. See OMB Bulletin No. 85-8 (December 17, 1984).

The bid protest provisions of the CICA went into effect on January 15, 1985, and litigation has already been filed to test the validity of the Department's conclusions with

respect to the unconstitutionality of the two bid protest provisions.

II

The next issue I would like to address is the substance of the Department's legal conclusion that the two provisions purporting to authorize the Comptroller General to bind the executive branch are unconstitutional. The Office of Comptroller General of the United States was created by the Budget and Accounting Act of 1921. See 42 Stat. 23 (1921). The Budget and Accounting Act expressly stated that the Comptroller General is "independent of the executive departments . . . ." Id. Subsequent legislation made it clear that the Comptroller General is part of the Legislative Branch. The Reorganization Act of 1945 specified that, for the purpose of the Act, the term "agency" meant any executive department, commission, independent establishment, or government corporation, but did "not include the Comptroller General of the United States or the General Accounting Office, which are a part of the legislative branch of the Government." 59 Stat. 616 (1945). The same provision was included in the Reorganization Act of 1949. See 63 Stat. 205 (1949). The Accounting and Auditing Act of 1950 declared that the auditing for the Government would be conducted by the Comptroller General "as an agent of the Congress . . . ." 64 Stat. 835 (1950).

Although the President nominates and, with the advice and consent of the Senate, appoints the Comptroller General, the President has no statutory right to remove the Comptroller General,

even for cause. See 31 U.S.C. § 703 (1982). The Comptroller General is appointed for a fifteen-year term, but he may be removed either by impeachment or by a joint resolution of Congress, after notice and an oppportunity for hearing, for "(i) permanent disabilty; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1). Given the breadth of the grounds of removal, particularly the terms "inefficiency" and "neglect of duty," Congress enjoys a relatively unlimited power over the tenure in office of the Comptroller General. 1/

Congress expected this broad power of removal to give it the right effectively to control the Comptroller General. The chief House manager of the Budget and Accounting Act stated with respect to the new position of Comptroller General:

> This officer is to be the arm of Congress. When he fails to do that work in a strong and efficient way, in a way that Congress would have the law executed, Congress has its remedy, and it can reach out and say if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed.

61 Cong. Rec. 1080 (1921) (remarks of Rep. Good).

1/ The Supreme Court has recognized that the power to remove an official is necessarily linked to the power to supervise and control the actions of that official. See Humphrey's Executor v. United States, 295 U.S. 602, 627 (1935).

Thus, the Comptroller General is unquestionably part of the Legislative Branch and is directly accountable to Congress. His status as a legislative officer may not be changed simply by assigning him certain executive responsibilities. As part of the congressional establishment, the Comptroller General may constitutionally perform only those functions that Congress may constitutionally delegate to its constituent parts or agents, such as its own Committees.

The Supreme Court has most recently and thoroughly considered the scope of Congress's authority to act through its agents in INS v. Chadha, 462 U.S. 919 (1983). In Chadha, the Court declared unconstitutional a one-house legislative veto provision. In so doing, the Court underscored the constitutional requirement that, in order for Congress to bind or affect the legal rights of government officials or private persons outside the Legislative Branch, it must act by legislation presented to the President for his signature or veto:

> The decision to provide the President with a limited and qualified power to nullify proposed legislation by veto was based on the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed. It is beyond doubt that lawmaking was a power to be shared by both Houses and the President.

103 S. Ct. at 2782. When Congress takes action that has "the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch," it must act by passing a law and submitting it to the President in accordance with the Presentment Clauses and the constitutionally

prescribed separation of powers. Id. at 2784 (emphasis added). The Court emphasized that "when the Framers intended to authorize either House of Congress to act alone and outside of its prescribed bicameral legislative role, they narrowly and precisely defined the procedure for such action." Id. at 2786. 2/

Finally, with respect to Congress's power over the Legislative Branch, the Court concluded:

> One might also include another "exception" to the rule that Congressional action having the force of law be subject to the bicameral requirement and the Presentment Clauses. Each house has the power to act alone in determining specified internal matters. Art. I, § 7, cls. 2, 3, and § 5, cl. 2. However, this "exception" only empowers Congress to bind itself and is noteworthy only insofar as it further indicates the Framers' intent that Congress not act in any legally binding manner outside a closely circumscribed legislative arena, except in specific and enumerated instances.

Id. at 2786 n.20 (emphasis added).

We believe that if a court were to apply the separation of powers principles discussed above to establish the constitutional

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2/ As the Court noted, there are only four provisions in the Constitution by which one House may act alone with the unreviewable force of law, not subject to the President's veto: the power of the House of Representatives to initiate impeachment, the power of the Senate to try individuals who have been impeached by the House; the power of the Senate to approve or disapprove presidential appointments; and the power of the Senate to ratify treaties negotiated by the President. See 103 S. Ct. at 2786.

role of the Comptroller General, it would limit the Comptroller General to those duties that could constitutionally be performed by a congressional committee. Thus, under the above principles, the Comptroller General may not act in an executive capacity, and he may not take actions that bind individuals and institutions outside the Legislative Branch. He may advise and assist Congress in reviewing the performance of the Executive Branch in order to determine if legislative action is desirable or necessary. He may not, however, substitute himself for either the executive or the judiciary in determining the rights of others or executing the laws of the United States. Our analysis of the bid protest provisions of the CICA is based upon these conclusions.

Under the stay provision of the CICA, a procuring agency is required to suspend a procurement upon the filing of a bid protest until the Comptroller General issues his decision on the protest. Thus, the Comptroller General is given the power to determine when the stay will be lifted by the issuance of his decision on a bid protest. As a practical matter, the Comptroller General could effectively suspend any procurement indefinitely simply by delaying for an indefinite period his decision on a bid protest.

From a constitutional perspective, we find nothing improper in the requirement for a stay, in and of itself. Congress frequently requires Executive Branch agencies to notify Congress of certain actions and wait a specified period before implementing those actions. These so-called "report and wait" requirements

were specifically recognized by the Supreme Court in Chadha as a constitutionally acceptable alternative to the legislative veto. See 103 S. Ct. at 2783.

The problem in this instance arises from the power granted to the Comptroller General to lift the stay. The CICA gives the Comptroller General, an agent of Congress, the power to dictate when a procurement may proceed. This authority amounts, in Chadha's words, to a power that has the "effect of altering the legal rights, duties and relations of persons . . . outside the legislative branch." See 103 S. Ct. at 2784. As a constitutional matter, there is very little difference between this power and the power of a legislative veto.

A difficult problem is presented in this instance, however, by the question of the extent to which the unconstitutional provision is severable from the remainder of the CICA. In Chadha, the Court ruled that an unconsitutional provision is generally presumed to be severable. The Court outlined several guidelines with respect to evaluating this issue in a specific instance. First, the Court stated:

> Only recently this Court reaffirmed that the invalid portions of a statute are to be severed "'[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not.'" Buckley v. Valeo, 424 U.S. 1, 108 . . . (1976), quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 . . . (1932).

INS v. Chadha, 103 S. Ct. at 2774. Thus, unless there are clear indications that Congress would have intended additional parts of

statute to fall because of the invalidity of a single provision, the invalid provision will be severed. Second, the Court stated that Congress did not intend that the entire statute or any other part of it would fall simply because another provision was unconstitutional. 103 S. Ct. at 2775. Finally, the Court stated that "[a] provision is further presumed severable if what remains after severance is 'fully operative as a law.' Champlin Refining Co. v. Corporation Comm'n, supra, 286 U.S. at 234." 103 S. Ct. at 2775. The severability issue must be analyzed in light of these principles.

The only aspect of the stay provision that is directly unconstitutional is the provision authorizing the Comptroller General to lift the stay by issuing his decision or finding that a particular protest is frivolous. If this provision alone were severed, the stay would remain in effect indefinitely because there would be no remaining statutory basis for terminating the stay. Although the statute could technically operate this way, as a practical matter this alternative would seem quite draconian because it would permit any bid protester effectively to cancel a procurement simply by filing a protest. It is clear that Congress did not intend such a result when it adopted the CICA. See H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984).

Alternatively, the stay provision could be intepreted to require a mandatory stay for a set period of time in order to give the Comptroller General an opportunity to reach a decision

on the bid protest. This period of time might be set at 90 working days, which is the period of time established by the CICA as the standard time within which the Comptroller General should issue his decision on a bid protest.

We do not believe, however, that such a reworking of the statute would be consistent with Congress's intent. First, such a construction would involve essentially a redrafting of the stay provision rather than simple severance of the offending sections. Second, and more important, it would mean that any time a bid protest were filed, a procurement would automatically be delayed for 90 working days. Thus, any interested party who might be able to file a protest, however ill-founded, could prevent a procurement for a not insubstantial period of time.

We do not believe that Congress intended the bid protest process to be subject to such potential manipulation. In fact, Congress expressly included the provision granting the Comptroller General the power to dismiss frivolous protests precisely in order to avoid this potential abuse. The conference report stated:

> The conference substitute provides that the Comptroller General may dismiss at any point in the process a filing determined to be frivolous or to lack a solid basis for protest. This provision reflects the intent of the conferees to keep proper contract awards or due performance of contracts from

> being interrupted by technicalities which interested parties in bad faith might otherwise attempt to exploit.

H.R. Rep. No. 861, 98th Cong., 2d Sess. 1436-37 (1984). Given our conclusion that the provision permitting the Comptroller General to terminate the stay immediately in the case of a frivolous protest is unconstitutional, we do not believe that Congress would have intended for all contracts to be delayed for any set period of time simply upon the filing of a protest, regardless of the good faith of the protestor or merit of the protest. Therefore, because the provisions permitting the Comptroller General to terminate the stay must be severed from the statute, we believe that the entire stay provision must be stricken as well. 3/

The provision permitting the Comptroller General to award costs, including attorney's fees and bid preparation costs, to a prevailing protestor, and which purports to require federal agencies to pay such awards "promptly," 31 U.S.C. § 3554(c)(2), suffers from a constitutional infirmity similar to the one that afflicts the stay provision. By purporting to vest in the Comptroller General the power to award damage against an

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3/ We do not doubt that, under the severability principles set forth above, the stay provision may be severed. The Act may operate perfectly well without the stay provision, and there is no indication that Congress would have wished the entire Act to fall if the stay provision were invalidated.

Executive Branch agency, Congress has attempted to give its agents the authority to alter "the legal rights, duties and relations of persons . . . outside the legislative branch." 103 S. Ct. at 2784. That this authority is in the nature of a judicial power makes it no less impermissible for Congress to vest it in one of its own agents. Congress may no more exercise judicial authority than it may exercise executive authority. See INS v. Chadha, 103 S. Ct. at 2788 (Powell, J., concurring). Although Congress may by statute vest certain quasi-judicial authority in agencies independent of Executive Branch control, see Humphrey's Executor v. United States, 295 U.S. 602 (1935), Congress may not vest such authority in itself or one of its arms, in clear violation of the constitutionally prescribed separation of powers.

Based on the foregoing discussion of the law of severability, we believe that the damages provision is clearly severable from the remainder of the CICA. The remainder of the Act is unrelated to the damages provision and may clearly continue to operate fully as a law without the invalid provision. Moreover, we find no evidence, either in the statute or in its legislative history, to indicate that Congress would not have enacted the remainder of the CICA without the damages provision. Therefore, only the damages provision need be stricken from the statute.

We wish to emphasize that we do not question the validity of the remainder of the CICA, and, in particular, the general grant of authority to the Comptroller General to review bid protests. Congress may, consistent with the Constitution, delegate to a legislative officer the power to review certain Executive Branch actions and issue recommendations based upon that review. Thus, the Comptroller General may continue to issue decisions with respect to bid protests. In accordance with the principles discussed above, however, these decisions must be regarded as advisory and not binding upon the Executive Branch.

III

The final issue that I would like to address is the decision of the Attorney General not to execute the unconstitutional provisions of the CICA. Under the Constitution, the President and his subordinates have a duty "to take Care that the Laws be faithfully executed." Art. II, § 3. Unquestionably, the requirements of the Constitution prevail over any statute adopted by Congress. Therefore, in the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the laws requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land.

We recognize, however, that, until a law is adjudicated to be unconstitutional, the issue of enforcing a statute of questionable

constitutionality raises sensitive problems under the separation of powers.

Historically, the Executive has taken the position that the Department appropriately will not defend the constitutionality of a statute when the statute, as does the CICA, infringes upon the constitutional prerogatives of the Executive. The President has a constitutional right, indeed a duty, to maintain the separation of powers established by the Constitution: "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." INS v. Chadha, 462 U.S. 919 (1983).

The legitimacy of such a refusal by the Department not to defend the constitutionality of a statute has long been recognized. For example, during the impeachment trial of President Andrew Johnson, Chief Justice Chase declared that the President had no duty to execute a statute passed by Congress which:

> directly attacks and impairs the executive power confided to him by [the Constitution]. In that case it appears to me to be the clear duty of the President to disregard the law, so far at least as it may be necessary to bring the question of its constitutionality before the judicial tribunals.

* * *

> How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no right to defend it against an act of Congress, sincerely believed by him to be passed in violation of it? 4/

This general principle has been carried out by the Executive Branch in a number of instances since the time of President Johnson. For example, the President acted directly contrary to a statute that prohibited the removal of a postmaster, based on his conclusion that the statute was unconstitutional. This act eventually led to the Executive's successful challenge to the act's constitutionality in litigation brought by the removed postmaster. Myers v. United States, 272 U.S. 52 (1926). See also Humphrey's Executor v. United States, 295 U.S. 602 (1935). In other instances, the Executive refused to defend statutes that impaired the constitutional prerogatives of the Presidency. See United States v. Lovett, 328 U.S. 303 (1946)(successful challenge to a statute that directed the salaries of certain federal employees not be paid); Buckley v. Valeo, 424 U.S. 1 (1976) (successful challenge to constitutionality of a statute that permitted appointment of members of the Federal Election Commission by members of Congress).

4/ R. Warden, An Account of the Private Life and Public Services of Salmon Portland Chase, 685 (1874)(emphasis in original). Chief Justice Chase's comments were made in a letter written the day after the Senate had voted to exclude evidence that the entire cabinet had advised President Johnson that Tenure in Office Act was unconstitutional. Id. See M. Benedict, The Impeachment and Trial of Andrew Johnson, 154-55 (1973). Ultimately, the Senate admitted evidence that the President had desired to initiate a court test of the law. Id. at 156.

In addition to these examples involving actual litigation with respect to constitutional conflicts, there are a number of examples of presidential refusals to execute statutes that unconstitutionally infringe upon presidential prerogatives by purporting to give Congress the authority to direct the Executive Branch with respect to the execution of the law. For example, in 1955, almost three decades before the Chadha case was decided, President Eisenhower instructed the Secretary of Defense to ignore a so-called "committee approval" provision contained in a Department of Defense appropriations act, by stating in a signing statement that the provisions "will be regarded as invalid by the Executive Branch of the Government . . . unless otherwise determined by a court of competent jurisdiction." Public Papers of the Presidents: Dwight D. Eisenhower, 689 (1955). In 1963, President Kennedy stated that the unconstitutional features of another committee approval device would be ignored, with the provision to be treated as a "request for information." Public Papers of the Presidents: John F. Kennedy, 6 (1963). President Johnson also made clear that the unconstitutional aspects of legislative veto devices would be ignored. Public Papers of the Presidents: Lyndon B. Johnson, 104, 1250 (1963-64). President Johnson instructed the Secretary of Agriculture, in connection with the making of loans under an amendment to the Bankhead-Jones Farm Tenant Act, 7 U.S.C. §§ 1010-12, "to refrain from making any loans which would

require committee approval." 2 Weekly Comp. Pres. Doc. 1676 (1966). The Chadha court never suggested that there was any impropriety in the President's conduct in contesting acts of Congress he believed infringed on his constitutional prerogatives. I would also like to note that the Attorney General properly followed the statutory procedures for the notification of Congress with respect to decisions not to defend the constitutionality of statutes.

The decision not to execute the unconstitutional provisions of the CICA is entirely consistent with historical and judicial precedent. The two provisions at issue directly infringe upon the constitutional prerogatives of the Executive Branch by proporting to permit an arm of the legislature to bind Executive Branch officials. As we indicated earlier, this constitutional defect is precisely the same problem that caused the Supreme Court to strike down the legislative veto in Chadha. Thus, the same considerations that motivated President's Eisenhower, Kennedy, and Johnson to direct the Executive Branch to disregard certain legislative veto provisions also warrant the decision (particularly now that the Supreme Court in Chadha has so clearly declared legislative vetoes to be unconstitutional) not to execute the provisions proporting to give an arm of the legislature the authority to bind the Executive Branch.

IV

Finally, I would like to make one additional point with respect to this issue. We all recognize that the constitutional issue at stake here will ultimately be resolved by the courts

and that the most responsible method for resolving this dispute concerning the separation of powers is to ensure a rapid judicial hearing of this question. If the Department were to execute fully the provisions of the CICA, however, we believe it is unlikely that the substantive issue would ever be able to be presented to a court. We believe that it is unlikely that, if the Executive Branch were to implement fully the provisions of the CICA, anyone would have standing to challenge the constitutionality of the provisions that purport to authorize the Comptroller General to bind the Executive Branch. Thus, on the basis of this conclusion, the Department's decision not to enforce the two unconstitutional provisions has the beneficial byproduct of rendering much more likely a speedy judicial resolution of this question, which would be in the best interests of both the Executive and Legislative Branches and would be most responsive to the special separation of powers problems presented by this issue.

As a final note, I would add that under the Department's policy of non-enforcement, the first challenge has been filed that raises the issue of the constitutionality of the CICA. See Lear Siegler, Inc., Energy Products Division v. Lehman, No. 85-1125 KN (C.D. Ca.). I understand that the Comptroller General, the House, and the Senate have all asked to participate in this litigation with respect to the constitutional issue. Thus, it seems clear that the courts will be permitted to have the final say on this question.

EL K. DEAVER
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F. FIELDING
nto car purchases

Congress, White House in Face-Off Over Powers of GAO on Contracts

Reagan Signed Provision He Now Condemns

By Myron Struck
Washington Post Staff Writer

Perhaps no constitutional matter is more vigorously policed in turf-conscious Washington than the separation of powers, by which the founding fathers sought to divvy up authority among equal branches of government.

So it is that a provision in the 1984 Deficit Reduction Act has become the latest centerpiece in a battle between Capitol Hill and the White House, with each side accusing the other of usurping its rightful authority.

The provision gives the comptroller general of the United States, who is head of the General Accounting Office, authority to hold up a federal contract if a competitor has filed a legitimate protest over the bidding process. Previously, the GAO had authority to look into bid protests but no power to keep a contract from being awarded during an investigation.

In effect, the 1984 law gave the GAO that power, which Congress figured was a good way to keep agencies from improperly awarding contracts.

Last July, President Reagan vigorously objected to the provision, arguing that the comptroller general is an "officer of Congress" who could not interfere with executive branch procurement.

Reagan signed the bill into law anyway. But in December, armed with a Justice Department opinion that the provision was unconstitutional, the Office of Management and Budget instructed departments and agencies to ignore it.

That has rankled key members of the House and the Senate. They contend that Reagan either should have vetoed the bill or honored the law until the courts had ruled on its constitutionality.

At a congressional hearing last week, Rep. Jack Brooks (D-Tex.), chairman of the Goverment Operations Committee, lashed out at OMB Director David A. Stockman for going "so far as to order federal officials to willfully violate the law."

"Absent a judicial determination

REP. JACK BROOKS
. . . lashes out at OMB's Stockman

on the provisions in question, it is the responsibility of government officials to comply with the statute in its entirety," Brooks said. "I believe the president has received incredibly bad advice from the attorney general [then William French Smith], the OMB director and the major procuring agencies on this matter."

In a statement at Brooks' hearing, Sens. William S. Cohen (R-Maine) and Carl Levin (D-Mich.) said that Reagan's "unilateral decision . . . to refuse to enforce a statute constitutes a usurpation of the proper role of the judiciary and a failure by the president to meet his constitutional responsibility to 'take care that the laws be faithfully executed.' "

Legal opinions abound on the controversy. Former attorney general Smith said in a recent letter to House Judiciary Committee Chairman Peter J. Rodino (D-N.J.) that the administration's position is based on a 1983 Supreme Court decision that threw out the legislative veto (*Immigration and Naturalization Service v. Chada*).

The legislative veto had become an increasingly popular device. Lawmakers saw it as a means to second-guess executive branch decisions. According to Smith, giving authority over contracts to the head of the GAO, "an arm of Congress," amounted to the same usurpation of veto power.

But the American Law Division of the Library of Congress, in an opinion requested by Brooks, essentially sided with the lawmakers.

The law division noted that the Constitution does not give the president the power to suspend a law.

"The legislative nature of the action taken by the administration . . . seems clear," the opinion said. "In doing so, the president has effectively suspended its operation across the board, an action which entails lawmaking."

By basing his order on the alleged unconstitutionality of the provision, the law division said, Reagan "arguably" intruded on the power of the judiciary as well.

The murky state of the legal opinions is due in part to the murkiness involving the status of the GAO: Is the comptroller general an officer of the legislative branch, the executive branch, or both?

The administration argues that the GAO is beholden to Congress, not to the White House, and that the comptroller general does not serve "at the pleasure of the president." But Comptroller General Charles A. Bowsher, who holds a 15-year fixed term, reminded Brooks' committee last week that he was appointed by the president and confirmed by the Senate.

Brooks' committee is looking for a parallel between Reagan's action and that of President Andrew Johnson, the only president to be impeached. Johnson, who was narrowly acquitted in a Senate trial in 1868, was accused of violating the federal Tenure of Office Act by attempting to fire his secretary of war, who had sided with Johnson's congressional adversaries.

The American Law Division did not find a clear precedent in the Johnson impeachment. It noted, however, that Johnson's supposed offense "occurred in justifying his exercise of a veto, not in defiance of a validly enacted and effective law."

Brooks said he intends to question Stockman and Justice Department officials at a second hearing today.